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11
12 SUPERIOR COURT OF STATE OF ARIZONA
13 COUNTY OF YAVAPAI

14 STATE OF ARIZONA,

15 Plaintiff,

16 vs.

17 JAMES ARTHUR RAY,

18 Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
MOTION FOR CONTINUANCE OF
PRESENTENCING HEARING AND
SENTENCING**

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2011 SEP 21 PM 3:38 ✓

SANDRA K. HANCOCK, CLERK
BY: 

1 **I. INTRODUCTION**

2 Mr. Ray has constitutional rights—under the Sixth Amendment, the Due Process Clause,
3 and the Arizona Constitution—to representation by the counsel of his choice. The erroneous
4 deprivation of these constitutional rights to counsel of choice is structural error, requiring reversal
5 of both convictions and sentences. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006)
6 (“[E]rroneous deprivation of the right to counsel of choice . . . unquestionably qualifies as
7 ‘structural error.’”). Thus, in enforcing these constitutional rights, Arizona and federal courts
8 forbid trial courts from denying a defendant his counsel of choice based solely on rigid adherence
9 to scheduling issues. *See State v. Aragon*, 221 Ariz. 88, 90 (App. 2009). It is the general rule that
10 “where the request is reasonable, where there have been no prior adjournments, where the length
11 of delay is moderate, and where the adjournment seems to be for legitimate reasons, the court
12 **should** allow a reasonable adjournment to permit a defendant to have retained counsel of his own
13 choice.” *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) (emphasis added).

14 These constitutional rights compel this Court to make reasonable accommodations to
15 permit Mr. Kelly to continue to represent Mr. Ray at the critical stage of sentencing. Contrary to
16 the State’s suggestions, Mr. Kelly is not fungible. As the Rule 38 local counsel, with more than
17 20 years of experience practicing criminal law in Yavapai County, Mr. Kelly is essential to the
18 adequate and effective defense of Mr. Ray in this prosecution. For that reason, Mr. Ray’s counsel
19 of choice for sentencing proceedings is Mr. Kelly. *See* Affidavit of Thomas K. Kelly, attached as
20 Exhibit A. *See generally People v. Crovedi, infra*, 65 Cal.2d 199 (Cal. 1966) (reversible
21 constitutional error where, after defendant’s preferred counsel suffered heart attack, trial court
22 denied continuance and appointed the incapacitated attorney’s partner as replacement).

23 At a minimum, the case law requires this Court to reserve judgment on the motion for
24 continuance until all of the factors, including Mr. Kelly’s medical status, can be fully considered.
25 As this motion was being drafted, the Defense received the Court’s Order Resetting Sentencing
26 Hearing. The Order acknowledges that the Court had only “very general medical information” at
27 the time of its ruling, and had not yet received legal authority submitted by the parties. Order at
28 1, 2. Nor was the Court then aware that several defense witnesses will be unavailable during the

1 week of September 26, as the Defense has just learned late today. Mr. Kelly is scheduled for
2 medical evaluation on Thursday, September 22, 2011. The Court should use the September 26
3 court date for a status conference at which the parties and the Court can address the appropriate
4 next steps with the benefit of medical input and in view of the legal authority discussed herein.

5 **II. ARGUMENT AND AUTHORITIES**

6 **A. Denying A Continuance Would Violate The Sixth Amendment and Due** 7 **Process Clause of the Federal Constitution and Article 2, Section 24 Of The** 8 **Arizona Constitution.**

9 1. A Criminal Defendant Is Guaranteed The Right To Be Represented By His 10 Counsel Of Choice Under The Federal and Arizona Constitutions.

11 The Sixth Amendment to the United States Constitution provides that “[i]n all criminal
12 prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his
13 defence.” U.S. Const. Amdt. VI. “[A]n element of this right is the right of a defendant . . . to
14 choose who will represent him.” *Gonzalez-Lopez*, 548 U.S. at 144. The United States Supreme
15 Court has made clear that “[t]he right to select counsel of one’s choice” is “the *root meaning* of
16 the [Sixth Amendment’s] constitutional guarantee.” *Id.* at 147–48 (emphasis added). Article 2,
17 Section 24 of the Arizona Constitution similarly protects a defendant’s right to choose his
18 representation. *See State v. Aragon*, 221 Ariz. at 90. And these constitutional rights impel a
19 procedural safeguard: “[w]hen a motion for a continuance . . . implicates a defendant’s Sixth
20 Amendment right to counsel,” the trial court must consider all of the relevant facts and
21 circumstances and “create a record of [the] reasons” for its ruling. *Id.* at 91 (quoting *Garrett*, 179
22 F.3d at 1147).

23 Although the right to counsel of choice is not absolute, a court errs by unyieldingly
24 prioritizing calendar concerns when a continuance would permit the defendant to proceed with his
25 counsel of choice: “a trial court, acting in the name of calendar control, cannot arbitrarily and
26 unreasonably interfere with a client’s right to be represented by the attorney he has selected.”
27 *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) (defendant was unconstitutionally denied right
28 to counsel of his choice where court refused to grant continuance to retained attorney who could

1 not prepare case in the ten days allowed by the trial court). Rigid prioritization of calendar
2 control may also violate Due Process. *See, e.g., Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (“a
3 myopic insistence upon expeditiousness in the face of a justifiable request for delay can render
4 the right to defend with counsel an empty formality;” in such a situation, “the denial of a
5 continuance” may be “so arbitrary as to violate due process”). The general rule is that “where the
6 request is reasonable, where there have been no prior adjournments, where the length of delay is
7 moderate, and where the adjournment seems to be for legitimate reasons, the court *should* allow a
8 reasonable adjournment to permit a defendant to have retained counsel of his own choice.”
9 *Perini*, 656 F.2d at 209 (emphasis added).

10 Arizona case law confirms these constitutional rules. In *State v. Aragon*, the Arizona
11 Court of Appeals held that the trial court’s denial of the defendant’s motion for continuance
12 violated the defendant’s constitutional right to the counsel of his choice. The defendant, facing
13 prosecution for aggravated DUI, had sought the continuance to substitute his privately retained
14 counsel for appointed counsel. The Court of Appeals explained that the factors to consider in
15 ruling on such a motion include:

16 whether other continuances were granted; whether the defendant
17 had other competent counsel prepared to try the case; the
18 convenience or inconvenience to the litigants, counsel, witnesses,
19 and the court; the length of the requested delay; the complexity of
the case; and whether the requested delay was for legitimate
reasons or was merely dilatory.

20 *Id.* at 90 (quoting *State v. Hein*, 138 Ariz. 360, 369 (1983)). Ultimately, the Court “conclude[d]
21 the trial court’s denial of a continuance . . . constituted an ‘unreasoning and arbitrary’ adherence
22 to its schedule without due regard for [the defendant’s] legitimate request to exercise his right to
23 the counsel of his choice.” *Id.* at 91. “[B]ecause ‘erroneous deprivation of the right to counsel of
24 choice . . . unquestionably qualifies as structural error,’” the court reversed the defendant’s
25 convictions and sentences. *Id.* (quoting *Gonzalez-Lopez*, 548 U.S. at 150).

26 Under the circumstances of this case, the relevant factors compel a continuance. Indeed,
27 facing similar circumstances, the Supreme Court of California held that the court’s denial of a
28

1 continuance violated the defendant's constitutional rights to representation of his own choosing.
2 *People v. Crovedi*, 65 Cal.2d 199 (Cal. 1966). In *Crovedi*, the defendant's attorney suffered a
3 heart attack after several days of a criminal trial and the defendant requested a continuance so that
4 the attorney could recuperate and proceed with the representation. The trial court denied the
5 continuance and instead appointed the incapacitated attorney's partner, who objected to the
6 appointment on the ground that he had inadequate time to prepare. The Supreme Court of
7 California reversed the defendant's subsequent conviction due to the violation of the defendant's
8 right to counsel of choice. The court explained that "the State should keep to a necessary
9 minimum its interference with the individual's desire to defend himself in whatever manner he
10 deems best, using any legitimate means within his resources." *Id.* at 208. "[T]hat desire," the
11 Court held, "can constitutionally be forced to yield *only* when it will result in significant prejudice
12 to the defendant himself or in a disruption of the orderly processes of justice unreasonable under
13 the circumstances of the particular case." *Id.* (emphasis added). And the trial court's duty to
14 "make all reasonable efforts to ensure that a defendant . . . can be represented by" the "attorney of
15 his own choosing" is "especially" applicable "when [the] defendant is in no way responsible for
16 the absence of his retained counsel." *Id.* These considerations apply here.

17 2. This Court Must Grant A Continuance To Protect Mr. Ray's Right To
18 Counsel Of Choice.

19 Denying a continuance in this case would prevent Mr. Ray from being represented by his
20 counsel of choice, Tom Kelly, and would thereby violate Mr. Ray's rights under both the federal
21 and Arizona constitutions. As set forth in the attached affidavit, Mr. Kelly is a long-time resident
22 of Yavapai County and member in good standing of the Arizona bar. Although undersigned
23 counsel from Munger, Tolles & Olson LLP associated with Mr. Kelly throughout trial, the
24 Defense decided at the outset of this case that, if a sentencing proceeding were necessary, Mr.
25 Kelly would handle the sentencing proceeding and related work. In accordance with that
26 decision, Mr. Kelly has been managing all work related to sentencing, including selection and
27 preparation of witnesses, legal research and drafting, and coordination and review of the pre-
28 sentence report.

1 In these circumstances, all of the applicable factors weigh in favor of a continuance. Mr.
2 Kelly's incapacitation is plainly not due to any fault or dilatoriness on the part of Mr. Ray or Mr.
3 Kelly. The Defense has not previously requested continuances due to counsel's unavailability
4 and will seek no more time than absolutely necessary to ensure that Mr. Ray receives a competent
5 defense by his chosen counsel. Furthermore, although the parties, the victims, and the court all
6 would prefer to avoid any delay whatsoever, there is no scheduling issue that would make a
7 modest continuance a "disruption of the orderly processes of justice [that is] unreasonable under
8 the circumstances of the particular case." *Crovedi*, 65 Cal.2d at 208. And proceeding with the
9 schedule proposed in the Court's recent Order would prevent Mr. Ray from calling several key
10 mitigation witnesses who state that they have conflicts on the new proposed dates.¹

11 As the attached affidavit sets forth, Mr. Kelly is restricted from undertaking any work
12 until at least Monday, September 26. This Thursday, September 22, Mr. Kelly is scheduled to
13 receive a complete medical opinion regarding his condition. If this Court rules now that the
14 sentencing hearing must commence on September 28, the Court will effectively rule that Mr.
15 Kelly cannot continue to represent Mr. Ray. That ruling would be in error: it would preclude
16 consideration of all relevant factors, *see Aragon, supra*, and would constitute the "unreasoning
17 and arbitrary' adherence to [the existing] schedule" that the Sixth Amendment and Due Process
18 Clause prohibit, *id.* The appropriate course is to hold a status conference on September 26 to
19 assess, with the benefit of updated medical information, legal authority, and witness availability,
20 the possibility of Mr. Kelly's continued representation of Mr. Ray.

21 Notably, it is improper to deny the continuance based on a belief that Mr. Ray may be able
22 to secure the representation of alternate counsel (including undersigned counsel), and thus
23 complete the sentencing proceedings without suffering prejudice. Because the right to counsel of
24 choice is fundamental, a defendant need not show that a deprivation would result in prejudice:
25 "[w]here the right to be assisted by counsel of one's choice is wrongly denied, . . . it is
26 unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment

27 ¹ Several of these witnesses had flown into Prescott at their own expense for the hearing that was
28 scheduled for Monday, September 19, 2011, and were present in Prescott on Monday.

1 violation. Deprivation of the right is 'complete' when the defendant is erroneously prevented
2 from being represented by the lawyer he wants, regardless of the quality of the representation he
3 received." *Gonzalez-Lopez*, 548 U.S. at 148.²

4 **B. Arizona Supreme Court Rule 38 Emphasizes The Importance Of**
5 **Participation By Local Counsel**

6 A ruling that the sentencing hearing must proceed without Mr. Kelly will risk not only a
7 constitutional violation, but also a violation of the rules of the Arizona courts. Under Rule 38 of
8 the Rules of the Supreme Court of Arizona, counsel admitted to practice *pro hac vice* must
9 associate with local counsel:

10
11 2. Association of Local Counsel. No nonresident attorney may
12 appear *pro hac vice* before any court, board or administrative
13 agency of this state unless the nonresident attorney has associated
14 in that cause an attorney who is a member in good standing of the
15 State Bar of Arizona (hereinafter called local counsel). The name of
16 local counsel shall appear on all notices, orders, pleadings, and
17 other documents filed in the cause. ***Local counsel may be required***
18 ***to personally appear and participate in pretrial conferences,***
19 ***hearings, trials, or other proceedings conducted before the court,***
20 ***board, or administrative agency when the court, board, or***
21 ***administrative agency deems such appearance and participation***
22 ***appropriate.*** Local counsel associating with a nonresident attorney
23 in a particular cause shall accept joint responsibility with the
24 nonresident attorney to the client, to opposing parties and counsel,
25 and to court, board, or administrative agency in that particular
26 cause.

27 17A A.R.S. Sup. Ct. Rules, Rule 38 (emphasis added).

28 Rules requiring foreign counsel to associate with local counsel have been consistently
upheld; such rules rest, *inter alia*, on local counsel's skill, experiences, and familiarity with state
courts. *See generally, e.g., Ford v. Israel*, 701 F.2d 689, 692 (7th Cir. 1983) ("Rules requiring

² As the Supreme Court has explained, to argue that a defendant must show prejudice in this context is "to
confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative
effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence
on whatever lawyer is chosen or appointed." *Id.* at 148.

In any event, as explained below in I.L.C., an order requiring Mr. Ray to proceed without Mr. Kelly
would not obviate the need for a continuance. Any alternate counsel, including undersigned counsel,
would need additional time in order to adequately represent Mr. Ray in the sentencing proceedings.

1 that local counsel appear *in all litigation* are, so far as we are aware, universal” (emphasis
2 added)). Accordingly, Mr. Kelly’s absence from trial raises distinct and far more problematic
3 concerns than would arise if one of the undersigned *foreign* counsel were unable to participate in
4 the sentencing proceedings.

5 If this Court requires the presentencing hearing to commence next week, Mr. Ray will
6 need to determine whether to seek permission from the Court to proceed with solely foreign
7 counsel. This Court, in turn, will need to determine whether to permit foreign counsel to
8 represent Mr. Ray, without the guidance of local counsel, at a critical stage of this criminal
9 proceeding. These are serious questions that must be decided only with the benefit of all
10 information. A continuance is necessary to allow for proper consideration of these issues by the
11 Court and the parties.

12 **C. Even If Sentencing Could Proceed Without Local Counsel, A Continuance Is**
13 **Necessary.**

14 1. A Reasonable Continuance Is Necessary To Permit Foreign Counsel To
15 Prepare for the Presentencing Hearing.

16 As described in the attached affidavit, Mr. Kelly’s office has managed the legal work
17 related to sentencing until his hospitalization. Even if this Court were inclined to deny a
18 continuance that would permit Mr. Kelly to continue representing Mr. Ray, a continuance would
19 still be necessary to permit foreign counsel to, among other tasks, familiarize themselves with the
20 sentencing proceeding, prepare sentencing memoranda, identify witnesses, and coordinate and
21 prepare witness testimony.

22 2. Several of the Defendant’s Witnesses Are Unavailable During the
23 Week of September 26.

24 Undersigned counsel has just received the Court’s order contemplating that the
25 presentencing hearing will commence during the week of September 26. Undersigned counsel
26 from Munger, Tolles & Olson had not been in direct communication with any witnesses prior to
27 today, as Mr. Kelly was handling all witnesses, but upon reliable information believe that a
28

1 number of these witnesses are not available during the week of September 26.³ Depriving Mr.
2 Ray of the ability to present mitigation evidence would indisputably implicate serious
3 constitutional problems under the Sixth Amendment and Due Process Clause.

4 **III. CONCLUSION**

5 Pursuant to the Sixth Amendment and Due Process Clause of the federal constitution;
6 Article 2, Section 24 of the Arizona Constitution, and the interests of justice, this Court should
7 grant a continuance and order that a status conference be held on Monday, September 26, 2012.
8

9 DATED: September 21, 2011

MUNGER, TOLLES & OLSON LLP

BRAD D. BRIAN

LUIS LI

TRUC T. DO

MIRIAM L. SEIFTER

THOMAS K. KELLY

13
14 By: 

Attorneys for Defendant James Arthur Ray

16 Copy of the foregoing delivered this 21st day
17 of September, 2011, to:

18 Sheila Polk
19 Yavapai County Attorney
20 Prescott, Arizona 86301

21 by 

26 ³ Immediately after the State's objection to the defense request for a continuance and the Court's
27 comments at the status conference, Ms. Do assumed efforts to coordinate the mitigation witnesses. Prior
28 to today, Ms. Do had no involvement in the coordination or preparation of the mitigation hearing. Ms. Do
began receiving information today that a number of witnesses, who had traveled to Arizona to appear
Monday, September 19 have conflicts and are unavailable during the week of September 26.